(23)

FEB 16 1942
CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MARY LOIS McINTOSH,
Petitioner,

v.

ELLA L. WIGGINS,
Respondent.

No. 915.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, In Equity.

BRIEF FOR RESPONDENT, IN OPPOSITION.

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No. 915.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, In Equity.

BRIEF FOR RESPONDENT, IN OPPOSITION.

Opinion Below. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported as *"McIntosh v. Wiggins,"* No. 11,781, In Equity,—123 F. 2d (Pamphlet No. 3, December 22, 1941), pages 316-323, and the dissenting opinion at pages 323-324.

Jurisdiction. Neither the petition for a writ, nor the brief in support, cites the Sections of the Judicial Code under which petitioner seeks to invoke the jurisdiction of this

Court to grant a writ, as required for such petitions by Rule 38, par. 2, and by Rule 12, par. 1, of this Court.

We shall contend later herein, that the instant petition does not present any such special or important reasons for granting a writ, as Rule 38 of this Court, paragraph 5 (b), indicates would appeal to the Court's discretion to grant such writ.

The petitioner herein will sometimes be referred to as Mrs. McIntosh, and respondent as Mrs. Wiggins. All italics herein are ours.

Summary Statement of the Matter Involved. A correct and summary statement of most of the facts relevant to the pending petition for a writ and of the matter involved is contained in the majority opinion below (*McIntosh v. Wiggins*, 123 F. 2d, at 318-320). Adopting said statement, we here print and quote a copy, including in brackets our own statements of supplemental and explanatory facts and other matter, deemed necessary to an adequate statement of the matters here involved [123 F. 2d, at 318]:

> "The appellant [Mary Lois K. McIntosh, petitioner herein for a writ] brought this action asking that the appellee [Ella L. Wiggins, respondent in said petition for a writ] be required to turn over to appellant certain property, together with the rents and profits thereof, and that appellee be enjoined from having the benefit of a provision of a decree of the Circuit Court of the City of St. Louis entered June 22, 1923, upon which it is asserted the appellee bases her right to withhold the property from appellant. From a decree dismissing the action, this appeal is taken.
>
> "The property involved is an undivided one-fourth of that portion [one-third] of the estate of John E. Liggett, deceased, which, by the terms of his will, went to his daughter Cora B. Fowler for life on the termination of two testamentary trusts. This property is held by the appellee, and she claims a life interest in it

under the will of John E. Liggett as construed by the decree of the Circuit Court of the City of St. Louis entered June 22, 1923, and also under the judgment of the United States District Court for the Eastern District of Missouri, affirmed by this Court in Perry v. Wiggins, 57 F. 2d 622 (certiorari denied 287 U. S. 609). [Petitioner's maiden name was Mary Lois Kilpatrick. Her married names at various dates referred to in litigation, to which she was a party, and concerning the will of John E. Liggett, were Mary Lois Hayes, Mary Lois Perry, plaintiff in Perry v. Wiggins, supra,—and Mary Lois McIntosh.]

"The appellant asserts that, by the terms of the will of John E. Liggett, who was her grandfather, she, on August 10, 1928, when her mother, Dolly L. Kilpatrick, died, became entitled to one-half of the [one-sixth interest in the] property in which her mother had acquired a life estate on the death of Cora B. Fowler [whose share was one-third], and that the provision of the decree of June 22, 1923, of the Circuit Court of the City of St. Louis, pursuant to which the appellee claims and holds the property, is erroneous and was obtained by fraud, accident or mistake, and that the appellee should be enjoined from having the benefit of it.

"The broad question presented is whether, under the facts disclosed by the record, the court below was required to grant the appellant the relief which she sought. To state these facts in complete detail would be more confusing than helpful. We shall refer to them only so far as necessary.

"The three daughters of John E. Liggett, a resident of St. Louis, Missouri, who died testate November 23, 1897, leaving a large estate, were Cora B. Fowler, Dolly L. Kilpatrick and the appellee, Ella L. Wiggins. The trusts created by the will terminated April 4, 1916. At that time the three daughters became entitled to receive the major portion [three-fourths] of their father's estate [one-fourth went to his grandson,—son of a deceased son]. They each received an undivided one-third of this [three-fourths] portion. They con-

ceived the idea that, under the will, they acquired estates in fee and not for life.

"[Following the termination of the trusts, the then trustees filed an 'accounting' suit in the state circuit court, to which Mrs. McIntosh was a party under her then name, Mary Lois Hayes (Phys. Ex. p. *196). The decree in said suit allotted one-fourth of the trust estates to the grandson, and three-fourths to the three daughters. The decree in said accounting suit expressly refrained from deciding whether the daughters took life estates or fees in their said three-fourths portion, but expressly reserved to them the right to sue later for the purpose of having said question decided. Their said 'idea' or contention that they took fee titles was prompted by this portion of said decree.]

"Whether their estates were in fee or for life depended upon the construction of the following provisions of the will:

" 'After the death of my said wife then my said stock * * * shall be further held by my said trustees under this trust for the sole benefit and behoof of my daughters * * * to their sole and separate use * * * for and during the natural lives of my said daughters, in equal portions, share and share alike, with remainder over as to the undivided share aforesaid, of each one, to the heirs of the body of each one of my said daughters as their absolute property, per stirpes and not per capita; but should any of my said daughters die without issue then her portion of said * * * stock herein bequeathed to her for life shall go to the survivor and survivors of my said daughters in equal portions for life, with remainder over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes.'

"[Another relevant provision of the will was that which gave to the daughters the share of the grandson in case he should die without issue before the termination of the trust,—reading:

" 'If my grandson, John E. Liggett, Jr., shall die before reaching the age of thirty years, without issue,

then and in that event his share of my estate hereinafter devised and bequeathed to him in this will shall go to such of my said daughters as shall survive him, in equal portions for life, and to the issue of such of them as shall then be dead, or shall die thereafter, share and share alike, per stirpes, and not per capita; and the last of my said daughters being dead the whole of John E. Liggett, Jr.'s share (he being dead before he arrives at the age of thirty years, without issue), shall go to and become the property of the issue of such of my said daughters as shall die leaving issue to take per stirpes, but said share is to be held and managed upon the same trusts as is provided in this clause of my will.']

"In May, 1920, the three daughters brought suit in the Circuit Court of the City of St. Louis to secure a construction of the will of their father, asserting that upon the termination of the trusts created by the will, they took fee title to their shares of the estate. All of the then existing descendants of the testator were made parties to the suit, including [among the defendants] the appellant, [under her then name, Mary Lois Perry], who was an adult daughter of Dolly L. Kilpatrick, and including, also, Elizabeth Liggett Scudder, a minor [defendant], who later became Elizabeth Kennard and who was the child of Elizabeth Scudder, a deceased daughter of Dolly L. Kilpatrick. If Dolly L. Kilpatrick had only a life interest in her share of her father's estate, with remainder over to her issue, then on her death the appellant and Elizabeth Scudder would, under the will of John E. Liggett, each take an undivided one-half of that share. If Dolly L. Kilpatrick and her sisters had a fee title to their respective shares, the appellant and Elizabeth Liggett Scudder would receive nothing under the will. The appellee, Ella L. Wiggins, also had an adult daughter [123 F. 2d, at 319], Eleanore Van Riper, who had two minor children. The appellant and the adult daughter of Ella L. Wiggins, although served with process in the will construction suit, did not appear. [Mrs. McIntosh was also served with a copy of the daughter's peti-

tion.] Elizabeth Liggett Scudder did appear and was represented by her father, as guardian ad litem. The grandchildren of Ella L. Wiggins were also represented by a guardian ad litem. The grandchildren of Dolly L. Kilpatrick and of Ella L. Wiggins [minor defendants] had the same counsel, who filed answers in their behalf asserting that the three daughters of John E. Liggett took estates for life in their respective shares of their father's estate, with remainder over to their surviving issue 'and, in case there be none, with remainder as to said share to the survivor or survivors of said daughters in equal portions for life, with remainder over in fee upon the death of the last survivor of said daughters to the surviving issue of said daughters, share and share alike, per stirpes.' These answers prayed that the court so construe the will. The trustees under the will, who were also parties to the suit, in their answer brought up certain doubtful questions relative to the disposition of undistributed property of the estate still in their possession, and prayed the aid and instructions of the court.

"After a trial, the Circuit Court of the City of St. Louis concluded that the daughters of the testator, by the terms of his will, took only life estates, with remainder to their issue. Counsel for the minor grandchildren of the two daughters of the testator who had issue (Cora B. Fowler was childless) was asked to draft the decree. [Lacking express instructions from the court concerning the court's view of the intended disposal of the share of a daughter who might die without issue], he wrote into his draft of a proposed decree his interpretation of the will respecting the devolution of the share of a daughter of the testator in case of her death without issue, which was that it would go to the surviving daughters of the testator and to the survivor of them for life, and would not vest in remainder until the last surviving daughter of the testator had died. The draft of a decree prepared by counsel for the minor grandchildren was finally approved as to form by all counsel for all parties who had appeared in the suit, and [after examination by

the trial judge] was entered by the court as its decree. The daughters of the testator then appealed to the Supreme Court of Missouri on the sole issue as to whether they had fee title to their shares of their father's estate. The questions as to what would become of the share of a daughter having a life estate, in the event she died without issue, and as to when the share of such a daughter would vest in remainder were not in dispute, were not raised, and, of course, were not before the Supreme Court of Missouri on the appeal. That court decided that the daughters of the testator took life estates only, and affirmed the decree appealed from. Wiggins v. Perry, 271 S. W. 815. In its opinion, the Supreme Court of Missouri copied almost verbatim a statement contained in the brief of counsel for the minor grandchildren, when it said (page 826 of 271 S. W.):

" 'We therefore respectfully submit that the will of John E. Liggett, construed according to its true intent and purpose, creates life estates only in his daughters, with contingent remainders over in the heirs of their respective bodies, and that the lineal descendants only of each daughter who answers the description of such heirs at the time of her death takes such remainders, and that the trial court was clearly right in so ruling.'

"It is, of course, obvious that in making that statement counsel and the court were dealing with the question of the estate which each daughter of the testator took under the will at the termination of the trusts, and were not dealing with the questions as to what would happen to the share of a daughter who died without issue and as to when title to her share would vest in remainder, which questions had not been presented on the appeal. That the Supreme Court of Missouri did not rule on these questions would not affect the conclusiveness of the decree. See and compare: Russell v. Russell, 3 Cir., 134 F. 840; Simonds v. Norwich Union Indemnity Co., 8 Cir., 73 F. 2d 412, 416.

"The decree of the Circuit Court of the City of St. Louis, affirmed on appeal, contained the following pro-

vision with respect to the devolution of the share of Cora B. Fowler:

" 'If both her sisters, Ella L. Wiggins and Dolly L. Kilpatrick, shall survive her, then an undivided one-half interest in said property shall go to and vest in each of said sisters for her life, and on the death of either of them, the undivided one-half interest therein of the one so dying shall go to and vest in the survivor for her life, and upon her death the whole of said property shall go to and vest absolutely in the then surviving issue of said Ella L. "[123 F. 2d, at 320]" Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita.'

"Cora B. Fowler died [without issue] July 19, 1928; [both of her sisters survived her]. Concededly, upon her death her share [one-third of the daughters' portion] of her father's estate passed to Dolly L. Kilpatrick and Ella L. Wiggins in equal portions for life. Dolly L. Kilpatrick died August 10, 1928, and her death is the real source of this controversy between the appellant [Mrs. McIntosh] and Elizabeth Scudder Kennard, on one side, and Ella L. Wiggins, on the other side. The appellant and Elizabeth Kennard of course received Dolly L. Kilpatrick's original share of the estate, but they claimed that, under the will, they were each entitled to one-fourth of the [one-third] share of Cora B. Fowler, an undivided one-half of which share had come to Dolly L. Kilpatrick for life on Cora B. Fowler's death. Ella L. Wiggins contended that, under the will and under the decree of the Circuit Court of the City of St. Louis, she, on Dolly L. Kilpatrick's death, was entitled to have Cora B. Fowler's full share for life, and that no part of it would vest in the issue of Dolly L. Kilpatrick until after her (Ella L. Wiggins') death.

"On June 19, 1929, the appellant, then Mary Lois Perry, brought an action in the United States District Court for the Eastern District of Missouri against Ella L. Wiggins to determine adverse claims. In that action appellant sought a judgment that, upon the death

of her mother [Mrs. Kilpatrick], one-fourth of Cora B. Fowler's share of the [trust] estate of John E. Liggett, one-half of which share appellant's mother had acquired for life on Cora B. Fowler's death, belonged to the appellant and did not belong [for life] to Ella L. Wiggins, who had possession of it. [Only the realty in the trust estate was directly involved.] Issues were joined. The question whether the decree of the Circuit Court of the City of St. Louis was determinative of the rights of the parties and was res judicata as to all issues was squarely presented. The appellant asserted that the decree of that court was not binding upon her because the above quoted provision of the decree relative to the devolution of the share of Cora B. Fowler was not within the issues tendered by the petition in the suit in which the decree was rendered; that the question of what would become of a share of a daughter who should die without issue had not been before the Circuit Court of the City of St. Louis for decision, and that that court had had no power to decide it. The United States District Court adjudged that the decree of the Circuit Court of the City of St. Louis in the will construction suit was within the issues tendered by the petition in that suit and was res judicata; that that court had had jurisdiction of the parties and of the entire subject matter covered by its decree in that suit; that appellant was bound by the decree and by the provision thereof of which she complained; and that Ella L. Wiggins was entitled to retain during her life the share of the estate of John E. Liggett in which Cora B. Fowler had originally had a life interest, and that no part of that share would vest in the surviving issue of Dolly L. Kilpatrick and of Ella L. Wiggins until the latter's death. Appellant took an appeal from the judgment. The judgment was affirmed by this Court in Perry v. Wiggins, 57 F. 2d 622 [on August 25, 1931; Phys. Ex. p. *553], and it became a final judgment.

"An abortive attempt by the appellant and her niece, Elizabeth Kennard, was made in 1933 to have the decree of the Circuit Court of the City of St. Louis in

the will construction suit corrected *nunc pro tunc* by that court. Wiggins v. Perry, 119 S. W. 2d 839. Appellant had commenced the present action in the court below in [March] 1931, and at or about the same time Elizabeth Kennard brought a similar action against Ella L. Wiggins in the Circuit Court of the City of St. Louis.

"In this case appellant again seeks to avoid the provision of the decree of the Circuit Court of the City of St. Louis which was held to be binding and conclusive upon her by the court below in the case of Perry v. Wiggins (affirmed, 57 F. 2d 622), and now asserts that the presence in the decree of that provision was the result of fraud, accident or mistake, and that the appellee should therefore be prevented from having the benefit of it. [The above quotation from the statement in the majority opinion in *McIntosh v. Wiggins*, 123 F. 2d, ends here, at page 320, but is resumed at page 322, as follows]:

"Since the entry of the decree of the court below in this case, the Supreme Court of Missouri, in the case of Kennard v. Wiggins, decided July 25, 1941,[1] has ruled that the challenged provision of the decree of the Circuit Court of the City of St. Louis was wrong with respect to the devolution of Cora B. Fowler's share of the estate of her father, and that, on Dolly L. Kilpatrick's death, the half of the share of Cora B. Fowler in which Dolly L. Kilpatrick had acquired a life estate vested in appellant and Elizabeth Kennard; that the latter is not bound by the decree of the Circuit Court of the City of St. Louis because she was a minor during the pendency of the will construction suit and those who represented her could not authorize or consent to the entry of any decree prejudicial to her rights."

[The quotations from the "statement" part of said opinion of the Circuit Court of Appeals end here.]

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1 We are advised that this case is not yet reported, and that a petition for rehearing is pending.

A copy of the first opinion of the Supreme Court of Missouri in *Kennard v. Wiggins* was filed by leave (R. 237) on behalf of Mrs. McIntosh, in the United States Circuit Court of Appeals, and in her instant suit against Ella L. Wiggins on September 8, 1941; a copy appears at R. 239-251. On the same day leave was granted to Mrs. Wiggins to file in the same court copies of her separate motions in the Supreme Court of Missouri "For Rehearing" and "To Withdraw and Modify" said opinion. Said copies were filed in the United States Circuit Court of Appeals on September 18, 1941 (R. 288). A copy of said motion for rehearing in the *Kennard* case is set out at R. 252-272; a copy of said motion to withdraw and modify said opinion in the *Kennard* case is set out at R. 272-288. Thereafter, on November 12, 1941, Mrs. McIntosh filed in the United States Circuit Court of Appeals her "Petition for Rehearing" in the instant cause; a copy appears at R. 303-342; said petition was denied by said Circuit Court of Appeals on November 26, 1941 (R. 343). On December 16, 1941, the Supreme Court of Missouri "On its own motion" modified its former opinion in the *Kennard* case, and by the same order overruled Mrs. Wiggins' above mentioned motions for rehearing and to withdraw and modify the original opinion in said cause (R. 355). On December 23, 1941, Mrs. McIntosh filed in the United States Circuit Court of Appeals, and in the instant cause, her Motion to Set Aside and Vacate the Judgment of said Circuit Court of Appeals, because of said modified opinion of the Supreme Court of Missouri in the *Kennard* case; a copy of said motion is set out at R. 347-371. On January 6, 1942, said Circuit Court of Appeals denied said motion (R. 372).

Thereafter, within rule time after the filing of the modified opinion of the Supreme Court of Missouri, Mrs. Wiggins filed in said Court her separate motions "For Rehearing" and "To transfer to said Court in Banc" as to the said

appeal in the *Kennard case.* At the time this brief is being written, neither of said last-mentioned supplemental motions has been ruled upon by said state Supreme Court.

Additional explanations or corrections of certain statements in the instant Petition and Supporting Brief for Mrs. McIntosh will be made in those portions of the Argument herein to which they relate. If the Court desires a more detailed statement of the facts in the instant McIntosh case, they will be found in the "Findings" of the District Court, set out at R. 123-196. The conclusions of the District Court are set out at R. 196-201, the directions for judgment at R. 201, and a copy of the judgment at R. 202.

ARGUMENT.

The Petition for a Writ (pages 20-22) states eleven separately alleged "Reasons" relied upon for the granting of a writ. To a substantial extent they are repetitious. It is respectfully submitted that the following "Argument" adequately answers the fundamental contention on which is based all of said "Reasons" considered in their entirety.

Summary of Argument.

I. The Petition for a Writ should be denied because the Circuit Court of Appeals has not decided any question of local law concerning the interpretation of the will, inconsistently with the decision of the Supreme Court of Missouri.

This is so because:

(1) The Supreme Court of Missouri and the Circuit Court of Appeals, respectively, dealt with the rights of parties differently situated.

(2) The Petition is based entirely upon an erroneous assumption and contention, since the Circuit Court of Appeals did not rule on the intent of the will.

(3) The complete fallacy of Petitioner's said fundamental contention appears from facts—indisputable upon the printed records.

(4) The doctrine of res judicata, applied in both Federal suits, was the rule, firmly established in both this Court and in the Supreme Court of Missouri, and applicable to suits between the same parties, involving the same dispute, and concerning the same, or a part of the same, property—therefore, in applying it in the instant McIntosh case, the Circuit Court of Appeals did not decide a point of law contrary to the state law on the same subject.

II. The Petition for a Writ should be denied, because it is the second such petition filed by Mrs. McIntosh, requesting this Court to hear and adjudge as between her and Mrs. Wiggins the same question of title that was involved in her first Petition for a Writ of Certiorari, which was denied by this Court.

III. The Petition for a Writ and its supporting brief err in assuming and suggesting that said modified opinion of the state Supreme Court evidences the final decision of the state Supreme Court in the Kennard case.

I. The Petition for Writ Should Be Denied Because the Circuit Court of Appeals Has Not Decided Any Question of Local Law Inconsistently With the Decision of the Supreme Court of Missouri.

(1) *This is so because the Supreme Court of Missouri and the Circuit Court of Appeals, respectively, dealt with the rights of parties differently situated.*

Mrs. Kennard, plaintiff in the state case (*Kennard v. Wiggins*, R. 356-371), was a minor at the time the will construction decree was entered. Mrs. McIntosh (plaintiff in the instant case) was then *sui juris*.

Solely because Mrs. Kennard had been a minor and because the state court held there was constructive (not actual) fraud on the part of counsel for her guardian ad litem, the state Supreme Court considered whether the disputed paragraph in the will construction decree was a correct interpretation of the will, and having decided that it was not, concluded, on both of said grounds, that said disputed paragraph was void as to Mrs. Kennard; said state court thus decided the question of "local law" upon which Petitioner relies, viz: *the meaning of the will.*

Because Mrs. McIntosh was an adult at the time of the will construction suit and had been personally served

with process and a copy of the petition therein, the Federal Courts (District and Appellate) held that she became estopped to deny that the will construction decree was correct, by her own conduct in standing mute and making no effort to defend her interests in the trust estate, and that therefore said Circuit Court of Appeals *was not required to decide whether the will had been rightly or wrongly construed.* Consequently, said court *decided no question of local law in conflict with the decision of the state Supreme Court* in the *Kennard* case. Both the Federal courts refrained from ruling on said question of local law.

The foregoing will appear upon analysis.

(2) *The Petition is based entirely upon the following erroneous assumption and contention.*

The Supreme Court of Missouri in its modified opinion in the *Kennard* case, held (a), that the disputed paragraph in the will construction decree had been wrong in its interpretation of the will, and (b), that *because it had been wrong,* the presence of said paragraph in said decree having been caused by the invalid act of the attorney for Mrs. Kennard's guardian ad litem (she being an infant defendant) in contending on her behalf for the same interpretation expressed in said paragraph, and said paragraph not having been directly called to the attention of the state supreme court in the appeal from said decree—a constructive fraud upon Mrs. Kennard had resulted. Because of the two above rulings, the basic (and erroneous) contention of the Petition for a Writ is, that the United States Circuit Court of Appeals *was obligated in the instant case to make similar rulings as to Mrs. McIntosh,* an adult defendant in said will construction suit, who, although served with a copy of the writ and petition therein, had stood mute—had made no defense in said will

construction suit, in either the state circuit, or state supreme, court.

By thus standing mute, she had estopped herself from making, in the instant McIntosh case, both of said contentions "(a)" and "(b)".

The following quotations show that the fundamental basis of the instant Petition for Writ is as above stated.

Speaking of the majority opinion of the Circuit Court of Appeals in the instant McIntosh suit, the Petition for a Writ states (page 12):

> *"The majority below give to respondent full benefit of a state decree,* which *the state law had adjudged to be wrong,* and to *have resulted from fraud."*

The "state decree" referred to is the disputed paragraph in the will construction decree. And the "state law" referred to is said modified opinion in the *Kennard* case.

Again (Petition, page 13):

> *"The majority below,* as a court of equity, *gives to* respondent *full benefit of a former Federal judgment in an action at law,* which judgment is wrong; which does an injustice; and which *rests solely upon a paragraph of a state decree,* which *the highest court of that state has adjudged to be wrong* and *has invalidated because of fraud."*

The "former Federal judgment" referred to is that in Mrs. McIntosh's first Federal suit against Mrs. Wiggins; and the "paragraph of a state decree" referred to, is again the disputed paragraph in the will construction decree.

So the fundamental contention of the Petition for a Writ is that said majority opinion and decision of the Circuit Court of Appeals in the instant *McIntosh* suit were erroneous and prejudicial to Mrs. McIntosh in two respects: (a) in that said majority opinion *itself gave to*

Mrs. Wiggins "the benefit of" (sustained as though correct) *the disputed paragraph of the will construction decree;* and also (b) in that said majority opinion *gave to Mrs. Wiggins "the benefit of" the judgment* in favor of Mrs. Wiggins, rendered in Mrs. McIntosh's first Federal suit against Mrs. Wiggins, which said judgment *"rests solely upon" the disputed paragraph in the will construction decree,* as though it were a correct interpretation of the will. And said fundamental contention argues further: that the recently modified opinion of the Supreme Court of Missouri in the *Kennard* case has held that said disputed paragraph in the will construction decree was not a correct interpretation of the will, and has also held that, therefore, but also because the attorney for the guardian ad litem of Mrs. Kennard (a minor defendant), without having lawful authority so to do, made the contention for her about the intent of the will that the state circuit court adopted as the disputed paragraph in the will construction decree, it follows that said paragraph became a constructive fraud and void as to Mrs. Kennard.

Upon the above premises, the erroneous conclusion is sought by the Petition to be established, that *because said modified opinion of the state Supreme Court established as the state law between Mrs. Kennard and Mrs. Wiggins,* that the disputed paragraph in the will construction decree was wrong in its interpretation of the will and was constructively fraudulent as to Mrs. Kennard, therefore *it was the duty of the Federal Circuit Court of Appeals in the instant McIntosh case to apply said state law and to reach a similar conclusion as between Mrs. McIntosh and Mrs. Wiggins,* although vital features of the two suits differed.

(3) *The complete fallacy of Petitioner's said fundamental contention appears from the following facts—indisputable upon the printed records*:

In neither Mrs. McIntosh's first Federal suit nor in her instant suit, against Mrs. Wiggins, did the decision in favor of Mrs. Wiggins *rest at all* upon a ruling that the disputed paragraph in the will construction decree *was right*, i. e., was *a correct interpretation of the will.* In neither suit did the Federal court attempt to interpret the will by deciding whether the disputed paragraph of said decree was right or wrong in such interpretation.

In each case the decision of the Federal Court rested upon the conclusion and ruling that *no matter whether the disputed paragraph of the will construction decree had been right or wrong in its interpretation of the will, Mrs. McIntosh was estopped by the doctrine of res judicata and because of her own conduct, to deny that said disputed paragraph was right.*

The opinion (not officially reported) of the District Court (Hon. C. B. Faris, Judge) in Mrs. McIntosh's first Federal suit (*Perry v. Wiggins*), said (Phys. Ex. p. *532):

> "Without further, I am of opinion that the defense of res adjudicata must be sustained. And this view obviously renders a consideration of the will, and of the clauses therein in dispute unnecessary to a decision here."

And the "Findings and Judgment" of said District Court entered February 20, 1931, stated (Phys. Ex. p. *538):

> "(17) That the premises considered, this Court holds and adjudges: that as between the parties hereto, the said decree of the Circuit Court, City of St. Louis, entered on June 22, 1923, construing the will of said John E. Liggett was and is res adjudicata and the plaintiff herein, Mary Lois K. Perry, was and

is bound and concluded thereby in this instant suit; * * *."

On the appeal by Mrs. McIntosh from said judgment, it was affirmed on August 25, 1931, by the United States Circuit Court of Appeals (Eighth Circuit) on a point of procedure, but the opinion of said Circuit Court of Appeals said (Phys. Ex. p. *552; *Perry v. Wiggins*, 57 F. 2d 622, at 625):

> "In this connection we wish to state that this holding of the court results in no prejudice to the appellant, as we have carefully examined the entire record, and are of the view that on the merits the judgment should be affirmed."

In Mrs. McIntosh's second (the instant) suit against Mrs. Wiggins, filed March 31, 1931 (R. 173), the District Court (Hon. Charles B. Davis, Judge) included in his "Special Findings of Fact and Conclusions of Law, etc.," on November 27, 1939, the following (R. 179):

> "The Court deems it unnecessary because of other Findings and Conclusions herein, to make any Findings or Conclusions upon the issue whether or not the disputed paragraph of the will construction decree is in harmony with the terms of the will and the intent of the testator."

Said "Conclusions of Law," without attempting to construe the Liggett will, held (R. 194): That the will construction decree was and is conclusive as res adjudicata between Mrs. McIntosh and Mrs. Wiggins as to the intent of testator, etc.; and that said judgment of the District Court in Mrs. McIntosh's said first Federal suit against Mrs. Wiggins was also res adjudicata in said second suit as to the title controversy and other points common to both of said suits (R. 195-196).

In said "Findings of Fact and Conclusions of Law," the

District Court did not attempt to interpret the disputed paragraph of the will.

On the appeal of Mrs. McIntosh from the decree in her said second (or instant) suit against Mrs. Wiggins, the Circuit Court of Appeals again decided in favor of Mrs. Wiggins, the same title controversy between Mrs. McIntosh and Mrs. Wiggins, on the ground of estoppel by the two former judgments and by applying the doctrine of res judicata, i. e., the estoppel of the will construction decree, and the later estoppel of the judgment in Mrs. McIntosh's first Federal suit (*McIntosh v. Wiggins*, 123 F. (2d), at 320-321).

In each of said Federal suits the estoppel was held to be a bar against Mrs. McIntosh's claim of title, no matter whether the disputed paragraph of the will construction decree was right or wrong in its interpretation of the will.

The opinion of the District Court in *Perry v. Wiggins* (Phys. Ex. p. *530) said and held:

> "It is obvious that if the matter complained of is res adjudicata, it will not aid plaintiff, even though it be true that the State Circuit and Supreme Courts were in error in the interpretation which they put on the will and on the disputed clause then, and now here in dispute."

That the decision of the Circuit Court of Appeals in Mrs. McIntosh's second (or instant) Federal suit is to the same effect, see *McIntosh v. Wiggins*, 123 F. (2d), at 320-321, paragraphs "2-6."

The decision of the *Kennard* case (in her favor), by the Supreme Court of Missouri, was based upon the combination of two rulings, viz.: *(first)* that the disputed paragraph in the will construction decree had not correctly interpreted the will; and *(second)* that the presence of said paragraph in said decree had been caused by an unauthor-

ized and invalid act of the attorney for her guardian ad litem in contending (partly on her behalf) for the same interpretation of the disputed paragraph of the will that he included in his draft for decree, and which the state circuit court adopted as the disputed paragraph of said decree entered of record. Therefore, said modified opinion decided that a constructive fraud upon Mrs. Kennard had resulted, though without any actual fraud (R. 368-370). In neither of the *McIntosh* cases were there any such rulings.

Absent either of said basic rulings, the decision could not have been for Mrs. Kennard. Said modified opinion states (R. 360):

> "It is contended that the construction given in the challenged paragraph of the decree is the correct construction. If so, there has been much ado about nothing."

Obviously, if said paragraph of the will construction decree was a correct interpretation of the will, Mrs. Kennard was not prejudiced by it, even though she was a minor defendant and though the attorney representing her interests was held to have exceeded his lawful authority by making the affirmative defense for her that had, through its adoption by the state circuit court, become the disputed paragraph in the decree.

It is equally obvious, that because Mrs. McIntosh, by her own conduct in the will construction suit, estopped herself from contending in her two Federal suits against Mrs. Wiggins that the disputed paragraph in the will construction decree was not the correct interpretation of the will, *the effect upon her is necessarily the same as though the disputed paragraph of the will construction decree had been held by the state supreme court to be a correct interpretation of the will.*

But Mrs. McIntosh brought this effect upon herself. No one else, certainly not Mrs. Wiggins, was responsible for it. Mrs. Wiggins and her two sisters (including the mother of Mrs. McIntosh) did all they could have reasonably been expected to do, in order to inform Mrs. McIntosh about the will construction suit. They caused her to be served with a copy of the summons and of their petition, which warned her (Phys. Ex. p. *185) that "contingent interests" under the Liggett will were to be adjudicated, and that the daughters were claiming to own fee titles (Phys. Ex. p. *197-198), a contention that was in complete hostility to the existence of any life estates or contingent remainders.

If Mrs. McIntosh had been reasonably diligent in the will construction suit to protect her contingent prospective interest in the trust estate she could have made in the state circuit and supreme courts and in the will construction suit the same contentions about the intent of the will, and about claimed frauds alleged to have been committed in each of said courts, that she and Mrs. Kennard have been asserting in several other futile suits ever since Mrs. McIntosh filed her first Federal suit against Mrs. Wiggins.

But she made no such effort. She did not appear nor file an answer in the state circuit court; nor did she appear or make any contention in the state supreme court in the will construction suit. From the June Term, 1920, when the will construction suit was filed, until June 19, 1929, when her first Federal suit was filed, she stood mute, although the will construction decree had been entered on June 22, 1923, and affirmed on March 16, 1925 (Phys. Ex. p. 113).

Because she thus "stood mute" and allowed the will construction decree to be entered and affirmed, and the affirmance to become final, the Federal District Court (Hon. C. B. Faris) held (Phys. Ex. pp. *530-531), under the doctrine of

res judicata, that she was estopped to claim that she had become the owner in fee, upon the death of her mother Mrs. Kilpatrick, of the same undivided one-twelfth interest in the trust real estate for which she sued in both her Federal suits.

The Circuit Court of Appeals, in its opinion in the instant case (*McIntosh v. Wiggins*, 123 F. [2d] 317, at page 322) held that:

> "Her own negligence in having failed to appear and defend her rights in that suit was enough to prevent the court below from granting her the relief which she seeks."

(4) *The doctrine of res judicata, applied in both of said Federal suits, was the rule firmly established in both this court and in the Supreme Court of Missouri, and applicable to suits between the same parties, involving the same dispute, and concerning the same, or a part of the same, property. Therefore, in applying it in the instant McIntosh case the Circuit Court of Appeals did not decide a point of law contrary to the state law on the same subject.*

The doctrine in this Court:

"A judgment rendered on the merits is conclusive as to all matters which were decided and as to all matters *which might have been decided;*" (citing cases—123 F. 2d 316, at 320-321).

A frequently cited decision of this Court on this doctrine, is *Cromwell v. County of Sac*, 4 Otto (94 U. S.) 351, at 353 (24 L. R. 195, at 198), where the Court said:

> "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery *or defense* actually presented in the action, but also as to every ground *which might have been presented*, is strictly accurate, when applied to the demand or claim in controversy."

The doctrine in the State Court:

The same doctrine has long obtained in the Supreme Court of Missouri. In *Cordia v. Matthes*, 344 Mo. 1059, at 1062, 130 S. W. (2d) 597, at 598, the Court quoted with approval, the following statement of it:

> [34 C. J., §1236] "(3) *Matters Which Might Have Been Adjudicated.* A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or *defeat* the claim, *but as to every other matter which might with propriety have been litigated and determined in that action.*"

In *Powell v. City of Joplin*, 335 Mo. 562, at 571, 73 S. W. (2d) 408, at 412, the court said:

> "It is a familiar Missouri rule that a judgment is conclusive not only as to questions which were raised but as to every question *which could have been raised.*"

To the same effect, see: *Consolidated School District v. Day*, 328 Mo. 1105, at 1113, 43 S. W. 2d 428, at 430; *Leslie v. Carter*, 268 Mo. 420, at 428, 187 S. W. 1196, at 1198; *City of St. Louis v. United Railways Co.*, 263 Mo. 387, at 425, 174 S. W. 78, at 84; *Summet v. City Realty Co.*, 208 Mo. 501, at 511-12, 106 S. W. 614, at 616; *Spratt v. Early*, 199 Mo. 491, at 501, 97 S. W. 925, at 928; *Donnell v. Wright*, 147 Mo. 639, at 647-648, 49 S. W. 874, at 875.

Therefore, in applying this doctrine to its decision of the instant *McIntosh* case, the Circuit Court of Appeals did not decide the case *contrary to this local law.*

Under this doctrine, if Mrs. McIntosh had been attentive instead of negligent, concerning her contingent interests in the trust estates, and had appeared by attorney in

the trial and appeal of the will construction suit, she could have opposed the contention about the meaning of the will that the attorney for Mrs. Kennard's guardian ad litem advocated; she would have known of his answer and trial brief. She would also have been shown the draft of decree; it was shown to and approved by all counsel who appeared in the case (*McIntosh v. Wiggins*, 123 F. 2d 316, at 319, par. 1). And if there had been fraud in its concoction, she could have prevented it in the circuit court. If she had appeared by counsel in the state supreme court in the appeal from the decree, she would have had a full opportunity there to call the attention of that court to the disputed paragraph of the decree and to oppose it, also to make any other desired contention concerning the intent of the will, or the charge of fraud in that Court. As an adult defendant, named in the petition, Mrs. McIntosh could therefore have prevented the existence of the same alleged factual grounds of fraud upon which she seeks in her instant suit against Mrs. Wiggins to have the disputed paragraph of the will construction decree held void.

Therefore, by standing mute she estopped herself from asserting in the instant suit, both of the grounds on which it is sought to be based.

Since it is clear and indisputable, that neither of the fundamental bases upon which the state supreme court decided the *Kennard* case, is available in the instant *McIntosh* Petition, as against Mrs. Wiggins, and that the Circuit Court of Appeals did not decide any question of local law contrary to established local doctrines, it is respectfully submitted that the pending Petition for a Writ should be denied.

II. The Petition for a Writ should be denied, because it is the second such petition filed by Mrs. McIntosh, requesting this Court to hear and adjudge as between her and Mrs. Wiggins, the same question of title that was involved in her first Petition for a Writ of Certiorari.

After the United States Circuit Court of Appeals, Eighth Circuit, had decided against Mrs. McIntosh (then Perry) her appeal from the judgment of the District Court in *Perry v. Wiggins,* supra, she filed with this Court her Petition for a Writ of Certiorari (No. 115) in said cause, which Petition was denied by this Court on October 10, 1932, and a rehearing was denied November 7, 1932 (287 U. S. 609, 77 L. Ed. 529).

The judgment of the District Court, which was affirmed in *Perry v. Wiggins,* 57 F. 2d 622, determined not only that the will construction decree of the Circuit Court, City of St. Louis, was res judicata as between Mrs. McIntosh and Mrs. Wiggins, but also determined that Mrs. Wiggins had a life estate in the same property which Mrs. McIntosh claimed to own, in her first Federal suit, and now claims to own in her second Federal suit. Referring to said judgment in *Perry v. Wiggins,* supra, the Circuit Court of Appeals in its recent opinion in *McIntosh v. Wiggins,* 123 F. 2d 316, at 321, said:

> "That judgment remains unmodified and in full force and effect. The appellee" (Mrs. Wiggins) "as against the appellant" (Mrs. McIntosh) "therefore holds a life interest in this property not only by virtue of the decree of the Circuit Court of the City of St. Louis which is attacked, but also by virtue of the judgment of the United States District Court in *Perry v. Wiggins which is not attacked.* Even if the judgment in *Perry v. Wiggins* was wrong, that is of no help to appellant, for a judgment which is wrong but unreversed and unmodified is just as effective as a judgment which is right. Thornton v. Carter, 8 Cir., 109 F. 2d 316, at 320, and cases cited."

So Mrs. McIntosh was held to be barred by two separate earlier judgments, one being the will construction decree, the other being said judgment in the first Federal suit.

The only new circumstance that has arisen since this Court denied Mrs. McIntosh's first Petition for a Writ, is the rendition by the Supreme Court of Missouri of its opinions (original and modified) in the *Kennard* case (R. 356-371).

Said modified opinion differed from the original opinion (R. 239-251) which it substituted, chiefly in that the modified opinion rested its decision on the conclusion that the peculiar circumstances (mentioned earlier herein), affecting Mrs. Kennard as a minor defendant, had worked a constructive fraud upon her, and that such *constructive* fraud constituted a sufficient basis for a judgment avoiding said disputed paragraph of the decree as between her and Mrs. Wiggins. Said modified opinion adhered to the ruling in the original opinion, that the disputed paragraph of the decree did not express a correct interpretation of the will.

Having shown above that Mrs. McIntosh was precluded by her own conduct in the will construction case, from making either of the contentions upon which said modified opinion rested its decision in the *Kennard* case, it is respectfully submitted that this pending and second effort by Mrs. McIntosh to persuade this Court to hear and determine her title controversy with Mrs. Wiggins, is not such as Rule 38, paragraph 5, of this Court indicates, would appeal to the discretion of this Court, to grant certiorari. Therefore the Petition should be denied.

III. The Petition for a Writ and its supporting brief err in assuming and suggesting that said modified opinion evidences the final decision of the state supreme court in the Kennard case.

A footnote to page 4 of the Petition states that on December 16, 1941, the Supreme Court of Missouri overruled a petition for rehearing in the Kennard case, but fails to state that said petition for rehearing related to the original (not to the modified) opinion of said state supreme court.

Said footnote also states that on December 26, 1941, Mrs. Wiggins filed a further petition for rehearing and a motion to transfer to the court en banc, and adds that:

> "At the time of writing this the Court has not acted upon the same, but *the Rules of that Court prohibit the filing of more than one petition for rehearing. Under the Constitution of Missouri, there is now no ground upon which the cause may be transferred to the Court in Banc.*"

The facts are: that by the same order in which the state Supreme Court modified its original opinion, it overruled Mrs. Wiggins' "Motion for Rehearing" (R. 252-272) and her "Motion to Modify or Withdraw" (R. 272-287) said original opinion, and also, of its own motion, modified said opinion (R. 355). Therefore the modified opinion (R. 356-371), which differed in vital respects from the original opinion, *became substituted for it, and now constitutes the opinion of said supreme court, Division One,* in the *Kennard* case.

Within rule time after the court had thus modified its original opinion, Mrs. Wiggins filed a "Motion for Rehearing" *addressed to said modified opinion* as then constituting the opinion of said court. At the same time she filed a "Motion to Transfer" the case on appeal to the Supreme Court of Missouri in Banc.

The applicable provision of the Constitution of Missouri in respect of such motions to transfer is found in Section 4 of the Amendment of 1890 to said Constitution (R. S. Mo. 1939, page 127c); it reads:

> "*Case transferred to court in banc, when.*—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or *when a federal question is involved,* the cause, on the application of the losing party, shall be transferred to the court for its decision; *or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.*"

Said "Motion to Transfer," filed by Mrs. Wiggins, was based upon two grounds: First, that certain rulings made in the modified opinion were of such great importance in the jurisprudence of Missouri and so revolutionary in character that Division One of the court should of its own motion exercise the discretion given it by the state Constitution by asking the entire court to share the responsibility of finally deciding said questions; and, second, that in case Division One should decide not to exercise said discretion by transferring the case upon said first ground, then the motion prayed for such transfer because the cause involved a federal question raised by Mrs. Wiggins at the first opportunity she had to do so because the federal question first arose by the filing of said modified opinion.

The Rules of the State Supreme Court contain no prohibition against the filing of a petition or motion for rehearing addressed to an opinion of a division of said court, which the court of its own motion had modified in respect of new and decisive rulings not contained in its original opinion. Said Rules do not seem to cover a situation of substantially the kind presented in that court in the instant *McIntosh* case.

In view of the foregoing facts and argument—the contentions and authorities cited in the pending Petition for a Writ and Supporting Brief in relation to all other points therein are irrelevant, and because of this conclusion it is deemed unnecessary to here analyze or discuss them.

CONCLUSION.

We submit that the writ should be denied for the following reasons:

(1) The Circuit Court of Appeals did not decide any question of local law concerning the will construction decree inconsistently with the decision of the Supreme Court of Missouri.

(2) The Petition is based entirely upon an erroneous assumption and contention, as shown by facts indisputable upon the records.

(3) The doctrine of res judicata being established law in both state and federal jurisdictions, the Circuit Court of Appeals, in applying it in the instant McIntosh case, did not decide a point of law contrary to the state law.

(4) An earlier petition by Mrs. McIntosh requesting this Court to hear and adjudge as between her and Mrs. Wiggins, the same question of title involved in this instant McIntosh case, was denied by this Court.

(5) The modified opinion of the state supreme court, treated by the Petition for a Writ as final, is not final because motions for rehearing and to transfer to the state supreme court in banc are still pending, undetermined at this time.

Respectfully submitted,

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